88-1500

Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1988

LONE STAR STEEL COMPANY,

Petitioner,

V.

GLENN UFFELMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1988

LONE STAR STEEL COMPANY,

Petitioner,

V.

GLENN UFFELMAN,

Respondent.

QUESTIONS PRESENTED

1. Whether the decision of the United States Supreme Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) requires evidence beyond that of a knowing or reckless disregard of the law to sustain a finding of willfulness under the Age Discrimination in Employment Act (ADEA).

2. Whether the decision of the Court in *Thurston* is applicable to cases of disparate treatment, or only to cases of disparate impact.

PARTIES TO PROCEEDING

Lone Star Steel Company; Glenn Uffelman. Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Lone Star Steel Company hereby states that it is a subsidiary of Lone Star Technologies, Inc. Lone Star Steel Company has eight subsidiary operating companies: E. B. Germany Research Park, Inc., Precision Tubular Manufacturing Company, Project Resources Company, Texas and Northern Industries, Inc., Texas Specialty Flat Roll, Inc., Thermal Processing, Inc., Tubular Finishing, Inc. and World Class Tubing, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	1
Parties to Proceeding	2
Table of Contents	3
Table of Authorities	4
Opinions Below	5
Jurisdiction	5
Statutes Involved	5
Statement of the Case	5
Reasons for Granting the Writ	6
Conclusion	9
Certificate of Service	10
Appendix	
Opinion of the Court of Appeals	A-1
Opinion of the District Court	B-1
Judgment of the Court of Appeals	C-1

TABLE OF AUTHORITIES

	Page
Cooper v. Asplundh Tree Expert Company, 836 F.2d 1544 (10th Cir. 1988)	7, 8
Dreyer v. Arco Chemical Company, Inc., 801 F.2d 651 (3d Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1348 (1987)	7
Gilliam v. Armtex, 820 F.2d 1387 (4th Cir. 1987)	8
Lindsey v. American Cast Iron and Pipe Company, 810 F.2d 1094 (11th Cir. 1987)	8
Schrand v. Federal Pacific Electric Company, 851 F.2d 152 (6th Cir. 1988)	7
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	1, 6, 8, 9

OPINIONS BELOW

The opinion of the District Court is unreported, and appears in the appendix at page B-1. The opinion of the Court of Appeals is reported at 863 F.2d 404 (5th Cir. 1989) and appears at the appendix at page A-1. The judgment of the Court of Appeals was entered on January 20, 1989 and appears at the appendix at page C-1.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621, *et seq.*

STATEMENT OF THE CASE

This case arose out of the termination from employment of the Respondent during a reduction in force. Respondent subsequently brought suit under the ADEA, alleging that he was terminated in violation of the ADEA, and that such violation was willful. The jury found that Respondent was terminated because of his age and, in addition, found Petitioner in willful violation of the law. The District Court denied Defendant's Motion for Judgment Notwithstanding the Verdict.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court, and held that a showing of willfulness under the ADEA may merely be established by a showing that a Defendant acted in knowing or reckless disregard of the ADEA.

REASONS FOR GRANTING THE WRIT

This case presents an issue of national importance in the administration of the Age Discrimination in Employment Act of 1967. That issue is whether a plaintiff must prove more than a knowing or reckless disregard of the ADEA in order to establish a willful violation of it.

A finding of willfulness is of particular importance under the ADEA since it (1) entitles a plaintiff to liquidated damages, that is, an automatic doubling of any back pay award, see 29 U.S.C. § 626(b), and (2) extends the statute of limitations from two to three years, see 29 U.S.C. § 626(e). In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court held that a violation of the ADEA is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128-129.

The Courts of Appeals have, however, had difficulty in applying the holding in *Thurston* — which involved a claim of disparate impact involving an age biased rule of the employer - to claims of disparate treatment - such as the termination of a single plaintiff in an age discrimination case. *Cooper v. Asplundh Tree Expert Company*, 836 F.2d 1544, 1549 (10th Cir. 1988). Because of this difficulty, the Courts of Appeals for the Third, Fourth, Sixth, Tenth and Eleventh Circuits have developed markedly different standards for determining when an employer's conduct is willful under the ADEA in a single disparate treatment case.

Thus, in *Dreyer v. Arco Chemical Company, Inc.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S.Ct. 1348 (1987), the Third Circuit held that Congress intended liquidated damages to be "punitive in nature," and adopted "outrageousness" as an appropriate prerequisite for a finding of willfulness. The Court of Appeals concluded that when an individual employee brings a disparate treatment case, "there must be some additional evidence of outrageous conduct to show willfulness." *Id.* at 658.

The Court of Appeals for the Sixth Circuit, in *Schrand v. Federal Pacific Electric Company*, 851 F.2d 152 (6th Cir. 1988), and the Court of Appeals for the Tenth Circuit in *Cooper v. Asplundh Tree Expert Company, supra*, explicitly rejected the reasoning of the Third Circuit, and held that the Supreme Court's decision in *Thurston* must be interpreted to mean that an employer's conduct is willful only if age was the predominant factor in the termination decision.

By contrast, the Court of Appeals for the Fourth Circuit, in *Gilliam v. Armtex*, 820 F.2d 1387 (4th Cir. 1987), apparently sought to find a middle ground, and held that an employer's "business justification defense," although insufficient to defeat liability, would, if compelling enough, warrant a finding that the plaintiff's termination was not willful. Finally, the Court of Appeals for the Eleventh Circuit has rejected each of these views, and has held that in a single disparate treatment case there is "no logical way to square a finding of intentional discrimination with a finding of good faith on the employer's part." Consequently, the Eleventh Circuit has held that a jury finding that a plaintiff was terminated because of age requires that the employer be found in willful violation of the ADEA. *Lindsey v. American Cast Iron and Pipe Company*, 810 F.2d 1094, 1100 (11th Cir. 1987).

The Courts of Appeals have adopted markedly different standards for resolving the issue of willfulness in a single disparate treatment case. No decision of this Court has ever sought to reconcile the appropriate standard of willfulness in such cases. This question should be decided by this Court to instruct lower courts on the necessary standard for willfulness in such cases. A writ of certiorari to the Court of Appeals should issue so that this Court might resolve these conflicting precedents, and to determine the applicability of *Thurston* to disparate treatment suits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CLARK, WEST, KELLER,
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CERTIFICATE OF SERVICE

I, William L. Keller, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of May, 1989, I served the requisite number of copies of the foregoing Petition for Writ of Certiorari on all parties required to be served, by depositing same in the United State mail, first class, postage prepaid, at the respective post office addresses:

Larry R. Daves, Esquire
Attorney at Law
2313 N. Flores, Suite 101
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William L. Keller

EQUAL EMPLOYMENT OPPORTUNITY
GLENN UFFELMAN, Plaintiff-Appellee,

v.

LONE STAR STEEL CO.,
Defendant-Appellant.

No. 88-2326

United States Court of Appeals
Fifth Circuit.

Jan. 20, 1989.

Discharged employee sued employer alleging violation of Age Discrimination in Employment Act. The United States District Court for the Eastern District of Texas, Sam B. Hall, Jr., J., entered judgment in favor of employee, and appeal followed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) evidence was sufficient to support jury finding that employer intended to discriminate against employee based upon age; (2) evidence supported jury finding that employer willfully violated Act; and (3) employee was entitled to back pay for period after he abandoned career as engineer and took job as hotel clerk.

Affirmed.

1. Civil Rights—43, 44(6)

Prima facie case of age discrimination in reduction in work force situation consists of satisfying Age Discrimination in Employment Act's standing requirements that plaintiff is within protected group and has been adversely affected by employer's decisions, showing that plaintiff was qualified to assume another position at time of discharge, and producing evidence from which fact finder might reasonably conclude that employer intended to discriminate in reaching decision at issue; if employer articulates legitimate reasons for its actions, plaintiff bears burden of demonstrating that those

reasons were pretextual. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

2. Civil Rights—43

In age discrimination case, inference of age discrimination can be drawn from preferred treatment of employees who are themselves of an age protected by Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

3. Civil Rights—44(6)

Evidence was sufficient to support jury's finding that age was determinative factor in employer's decision to terminate 60-year-old engineer, notwithstanding employer's contention that discharge was based upon engineer's poor work performance and legitimate reduction of work force; although evidence was conflicting, jury could have concluded that engineer was well qualified to perform his job, and a much higher percentage of younger engineers were retained and a higher percentage of older engineers were fired in connection with work force reduction. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

4. Civil Rights—9.15

Fact that employer seeks out legal advice before implementing work force reduction program which involves termination of older employees does not preclude finding of willfulness in Age Discrimination in Employment Act case. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

5. Civil Rights—44(6)

Evidence supported jury finding that employer's age discrimination in connection with discharge of employee was willful within meaning of Age Discrimination in Employment Act; despite comprehensive meetings discussing reorganization which led to employee's discharge, no discussion was held concerning reorganization plan's age impact from which jury could infer careless disregard or intentional

avoidance of that aspect of plan, and manager who made decisions regarding which employees would remain following reduction in work force did so without developing objective job descriptions to guide him. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

6. Civil Rights—46(12)

Discharged employee, who had proven Age Discrimination in Employment Act claim, was entitled to back pay for period after he abandoned career as engineer and accepted job as hotel clerk; employee accepted clerk's job in order to have some sort of gainful employment. Age Discrimination in Employment Act of 1967, §§ 2-17, 29 U.S.C.A. §§ 621-634.

Appeal from the United States District Court for the Eastern District of Texas.

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

REAVLEY, Circuit Judge:

Defendant Lone Star Steel Co. appeals from a judgment based upon a jury verdict awarding back pay and liquidated damages to a discharged employee for a claim under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634. We affirm.

I. BACKGROUND

Lone Star Steel Co., a manufacturer of tubular products for use in the oil and gas industry, hired Glenn Uffelman as a staff engineer in 1975 when he was fifty-one years of age. Uffelman, who came to Lone Star with a degree in engineering and over twenty years experience as a production engineer, was assigned to the construction engineering section of the engineering department. He performed a variety of services there, including among other things supervising the activities of outside contractors and working as an expediter for various engineering projects.

In 1982, William Ulevich was hired to manage the engineering department at Lone Star. Shortly thereafter, the price of oil began declining, together with the need for drilling equipment and Lone Star's products. Ulevich decided that the engineering department would have to be reorganized and jobs terminated. On December 15, 1983, Ulevich submitted his proposal for the reorganization to Lone Star's human resources department. This proposal called for the elimination of the construction engineering section and the reorganization of the remaining engineering sections into four subdepartments. Although Ulevich did not develop objective job descriptions, he determined in general what functions engineering would continue to perform and how many employees would be needed to perform those functions. Ulevich then matched employees to the remaining jobs and presented the entire plan to Robert Frane, the director of human resources.

On May 3, 1984, Uffelman, along with nine other Lone Star employees, was discharged. Of the ten who were terminated, nine were over the age of forty and thus within the ADEA's protected group.[1] After complying with the administrative steps through the Equal Employment Opportunity Commission, Uffelman brought this suit against Lone Star pursuant to the ADEA, alleging that his discharge was unlawful in that his age was a determinative factor in the decision to let him go. Lone Star claimed that Uffelman's discharge was motivated by the company's declining business and Uffelman's unsatisfactory work performance. The jury, finding both that Lone Star discharged Uffelman because of his age and that it did so willfully, awarded back pay in the amount of $75,910.25. The district court, denying Lone Star's motions for judgment n.o.v. and for a new trial, doubled this amount in its entry of judgment based on the jury's finding of willfulness.[2] *See* 29 U.S.C. §§ 626(b).

Lone Star appeals on the following grounds: (1) that the

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[1] 29 U.S.C. § 631(a) provides that "[t]he prohibitions in this chapter . . . shall be limited to individuals who are at least 40 years."

evidence was insufficient to support the jury's finding of intent to discriminate; (2) that the evidence was insufficient to support the jury's finding that Lone Star willfully violated the ADEA; and (3) that Uffelman's back pay should have been tolled from January 1985 to the present since the evidence established that Uffelman voluntarily withdrew from the labor market, thereby willfully failing to mitigate his damages.

II. SUFFICIENCY OF THE EVIDENCE

In reviewing the denial of a motion for judgment n.o.v., this court's task is to determine whether the record contains evidence upon which a reasonable trier of fact could conclude as the jury did, keeping in mind that "it is the function of the jury as the tradition finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v. Shipman*, 411 F.2d 365, 275 (5th Cir. 1969) (en banc).

A. *Age Discrimination*

[1] The plaintiff's prima facie case of age discrimination in a reduction in force situation consists of: (1) satisfying the ADEA's standing requirements that he is within the protected group and he has been adversely affected by the employer's decisions; (2) showing that he was qualified to assume another position at the time of the discharge; and (3) producing evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 642 (5th Cir.1985). The employee may meet this burden by proving that younger

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[2]Uffelman also brought an action pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* The district court's original judgment in this case, entered on April 6, 1988, did not dispose of the ERISA claim. Therefore, Lone Star's notice of appeal, filed on April 7, was not from a final judgment. On October 20, the district court, pursuant to Fed.R.Civ.P. 54(b), certified the April 6 judgment as a final judgment and Lone Star filed a new notice of appeal.

employees, or those outside the protected group, were more favorably treated. *Id.* at 639. If the defendant articulates legitimate reasons for its actions, the plaintiff bears the burden of demonstrating that those reasons were pretextual. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

[2, 3] Lone Star claimed that Uffelman was terminated because of the company's declining business and Uffelman's substandard work performance. The parties presented conflicting evidence regarding Uffelman's work record, and Uffelman's response to the workforce reduction explanation was that Lone Star resolved admitted financial problems by terminating older employees in a discriminatory fashion. We conclude that the jury was presented with evidence from which it was entitled to find that Lone Star did discriminate because of age and that its proffered rationale for Uffelman's termination was pretextual.

Contradictory stories arose regarding Uffelman's performance on the job. Lone Star claimed that Uffelman's performance had been unsatisfactory for quite some time before he finally was discharged. It pointed out that Uffelman's annual performance rating reached its lowest point in 1980 and that in 1983 he was placed on probation at the request of his supervisor, Frank Rice.[3] Uffelman offered evidence to show, however, that some of the reprimands on which his ratings were based were ill-founded. The conflict in the evidence surrounding Rice's action may have been particularly significant to the jury. Ulevich testified that Rice wanted to discharge Uffelman and came to Ulevich with the request that this be done. Rice testified that he made no such request, that he never intended to see Uffelman—who did

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[3]Lone Star rates an employee's performance according to a five-point scale. One represents unsatisfactory performance. Two indicates that the employee met minimum performance requirements. Three represents satifactory performance. Four indicates that the employee exceeded requirements. Five represents outstanding performance. Uffelman received his lowest rating, a 2.7, in 1980.

excellent work—discharged, and that he recommended an upgrade of Uffelman's evaluation which Ulevich refused. Other co-workers testified that he had done good work for Lone Star over the years and that the quality of his work compared well with that of other similarly situated engineers. A supervisor in another engineering section requested that Uffelman be transferred to his group to work on a special project. That request, too, was denied by Ulevich. From this evidence, the jury could have concluded that Uffelman was well qualified to perform his job and that Lone Star's articulated reason for firing him was simply pretextual.

The reduction in force, itself admittedly justified, did not explain Ulevich's decision to discharge Uffelman while retaining several younger, less experienced engineers who continued to perform tasks that Uffelman was qualified to do. This was Uffelman's evidence which the jury accepted. Two engineers, Ogg and Schlossel, both under the age of forty, were retained and transferred to positions which Uffelman apparently convinced the jury he was qualified to fill. Other engineers, within ADEA's protection, were also retained and Uffelman's evidence compared his qualifications favorably with theirs. Lone Star contends that no inference of age discrimination can be drawn from the preferred treatment of engineers who were themselves at an age protected by the ADEA. We disagree. "We have never demanded rigid adherence to the requirement that the plaintiff establish that he was treated unfavorably as compared with people outside of the protected class—*i.e.*, under age forty." *Thornbrough*, 760 F.2d at 643 n. 14. As we noted in *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980),

> because the discrimination involves age, rather than sex or race, a requirement that the replacement be from a nonprotected group fails to take the reality of the working place into account. Because of the value of experience rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged. That the person is replaced by a person ten years younger rather

than twenty years does not diminish the discrimination; the subtlety only tends to disguise it.

The evidence at trial indicated that one of the main purposes of the reorganization was to cut costs. Lone Star saved money in terminating Uffelman's salary and benefits, and by discharging Uffelman nine months short of the time at which his pension was to have vested, and thereby avoiding the expense of retirement pay, the company realized an additional savings. Uffelman established that other older employees were discharged at the same time that he was. Three out of five engineers aged sixty or older were let go, including Frank Rice, the oldest and highest paid engineer in construction engineering, while only one of twenty-four employees under the age of forty were terminated. The jury was entitled to infer for the evidence that, by retaining younger, lesser paid employees who were not nearly so close to retirement, Lone Star was attempting to further a plan to reduce the average age and pay of its employees.

Uffelman also presented evidence tending to show that younger employees were given differential treatment and were subjected to less scrutiny than the older employees. For example, some of the younger employees left the grounds for late lunches quite frequently. On one occasion when Uffelman took a late lunch, he was reprimanded and written up. Younger employees were offered the chance to take computer training courses while Uffelman was not. This court has held that this sort of treatment is some evidence of discriminatory intent. *See Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 209 (5th Cir. 1986).

The evidence was sufficient to support the jury's finding that age was a determinative factor in Lone Star's decision to terminate Uffelman.

B. Willfulness

The more difficult issue presented in this appeal concerns the issue of whether Lone Star's discrimination was willful within the meaning of the statute. According to *Trans World*

Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), a violation of the ADEA is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128-29, 105 S.Ct. at 625-26. In *McLaughlin v. Richland Shoe Co.*, ___ U.S. ___, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), the Supreme Court made clear that a finding of unreasonableness will not suffice as proof of knowing or reckless disregard:

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either petitioner's test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under the petitioner's test, it should not be so considered under *Thurston* or the identical standard we approve today.

108 S.Ct at 1682 n. 13. A finding of willfulness is of particular importance since it (1) entitles a plaintiff to a doubling of any back pay award, *see* 29 U.S.C. § 626(b), and (2) extends the statute of limitations from two to three years, *see* 29 U.S.C. § 626(e).[4]

[4] Lone Star contends that it introduced overwhelming, uncontroverted evidence that it acted reasonably and far from willfully in seeking to ensure that its reorganization plan would comport with the law, including the fact that it conducted an independent evaluation of its plan and both sought and received approval of the plan from Lone Star's corporate counsel. Lone Star cites *Halferty v. Pulse Drug Co.*, 826 F.2d 2, 3-4 (5th Cir. 1987), to stand for the proposition that the fact that an employer seeks out legal advice before implementing a program like the one at issue here precludes a

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[4]Because Uffelman filed this suit over two years after the alleged discriminatory firing, his entire claim would have been barred had the jury not found that Lone Star's violation of the ADEA was willful.

finding of willfulness. While we agree that an employer who acts reasonably and in good faith in attempting to determine whether its plan will violate the law does not act willfully, it does not follow that seeking legal advice *ipso facto* establishes the appropriate intent. In reaching a determination on the issue of an employer's good faith, the jury is entitled to weigh the credibility of witnesses and to disbelieve self-serving testimony. *Guthrie*, 803 F.2d at 207.

[5] Lone Star presented the testimony of its manager of human resources, Mr. Frane, who testified that the reorganization plan designed by Ulevich underwent a three-tiered evaluation process prior to its implementation: (1) a series of meetings with Ulevich to determine the factual basis for the reorganization and the reasons that certain employees were being retained while others were being terminated; (2) an independent evaluation of the reorganization by E.G. Thompson, the manager of equal employment opportunity; and (3) an evaluation of the reorganization by Lone Star's corporate counsel, William Osborn. Neither party called Thompson or Osborn to corroborate or dispute this testimony, but Uffelman did call Ulevich, who testified that he never discussed the age factor inherent in the reorganization with anyone.

Lone Star argues that the fact that Frane did not discuss the impact of the reorganization on older employees with Ulevich does not necessarily mean that such an analysis was never made. We agree. Indeed, under this record the jury may have concluded that the analysis was that of Ulevich and that his preferences and prejudices determined the decision. The jury was free to make reasonable inferences from this evidence of the discussion with Frane. A reasonable juror might have concluded, for example, that the failure to discuss with Ulevich the reorganization plan's age impact, in what were by Lone Star's own admission comprehensive meetings, represented a careless disregard or intentional avoidance of that aspect of the plan. Furthermore, the jury was entitled to disbelieve Frane's self-serving testimony that he and other Lone Star officials carefully reviewed the reorganization plan for compliance with the law, especially

in light of the fact that neither Thompson nor Osborn was called upon to testify regarding their roles in the evaluation process.

There is another reason to question Lone Star's contention that it acted in good faith in evaluating the legality of the reorganization plan. Ulevich testified that he made his decisions regarding which engineers would remain following the reduction in force without developing objective job descriptions to guide him. Human resources then approved the plan without developing job descriptions as called for by the plan. Although Lone Star claimed that this was not out of the ordinary, the jury was entitled to conclude from this evidence that Lone Star set up the evaluation process merely to create the appearance that it had acted objectively and in good faith. Also, there was some evidence that Lone Star failed to comply with its own policies in evaluating the performance of its employees prior to the reduction in force. Ulevich relied on those same evaluations in deciding which employees would be terminated.

The jury was instructed that in order to find that Lone Star's conduct in violating the ADEA was willful, it had to find that Lone Star knew that its conduct violated the law or had reckless disregard for whether its actions conformed to the law;[5] it was also instructed that good faith was a defense for Lone Star. The jury was entitled to weigh the credibility of the witnesses and the evidence presented and to find that the evaluation process set up by Lone Star was designed simply to establish its innocence in the event its actions were challenged later. This in itself, taken in connection with the intent to make age a factor and to discriminate against it, is sufficient to support a finding of willfullness.

III. BACK PAY

[6] Lone Star contends that Uffelman is entitled to back pay, if at all, only from May 1984, when he was discharged, to January 1985. Lone Star claims that it introduced overwhelming evidence that in January 1985 Uffelman made a conscious decision not to remain in the labor market for

employment comparable to that which he had at Lone Star and that, therefore, he willfully failed to mitigate his damages.

Uffelman presented evidence at trial from which the jury could have concluded that he was unable to obtain comparable employment and that he eventually accepted a job as a hotel clerk in order to have some sort of gainful employment. That he worked less hours and made less money than he could have in that capacity does not mean that he should be entitled to no back pay from that time forward. Without more, we decline to disturb the jury's finding regarding the amount of back pay to which Uffelman is entitled.

The judgment of the district court is AFFIRMED.

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[5]Since the Supreme Court articulated this standard for "willfulness" in *Thurston*, circuit courts continue to add to the standard. *See Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988) (willfulness in disparate treatment case requires finding that age was the "predominant factor" in employer's decision); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 656-58 (3d Cir. 1986) (finding of willfulness requires evidence of outrageous conduct by employer). The district court here actually instructed the jury that in addition to finding a knowing or reckless violation of the ADEA, it must find "that the Defendant engaged in outrageous conduct beyond mere violation of the [ADEA]" in order to find willfulness. This instruction undoubtedly was based on the Third Circuit's standard set out in *Dreyer*, the most stringent standard adopted by any circuit. We believe it exceeds the *Thurston* standard, but no one complains here because the jury found that Lone Star's conduct was willful pursuant to this instruction. Perhaps the evidence here was sufficient to meet the "outrageousness" standard. As was discussed previously, Lone Star discharged Uffelman only nine months prior to the vesting of his pension benefits. In *Dreyer*, the Third Circuit wrote that "termination of an employee at a time that would deprive him or her of an imminent pension might show the 'outrageousness' of conduct that would warrant double damages." *Dreyer*, 801 F.2d at 658. Lone Star argues that, with nine months to go, the vesting of Uffelman's pension was not "imminent" as that word was used in *Dreyer*. While terminating an employee nine months before his pension is to vest may not be as egregious as terminating an employee with only nine days to go, the jury was entitled to consider this evidence in light of all the other facts and circumstances presented and to attribute to it whatever weight it deserved.

Filed By Clerk
U.S. District Court
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Texas Eastern

By .....

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GLENN UFFELMANN	X	**CIVIL ACTION NO.**
v.	X	
LONE STAR STEEL COMPANY	X	**M-87-0051-CA**

ORDER

On this day came on to be considered defendant's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. The Court having reviewed defendant's motion and plaintiff's response is of the opinion the motion should be denied. It is therefore,

ORDERED, ADJUDGED AND DECREED that defendant's motion for judgment notwithstanding the verdict or, in the alternative motion for new trial be and is hereby in all things denied.

SIGNED this the 15th day of March, 1988.

UNITED STATES DISTRICT JUDGE

U.S. Court of Appeals
F I L E D
Jan. 20, 1989
Gilbert F. Ganucheau, Clerk

By .....
Deputy

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2326

D. C. Docket No. M-87-51-CA

GLENN UFFELMAN,
Plaintiff-Appellee,

versus

LONE STAR STEEL CO.,
Defendant-Appellant.

Appeals for the United States District Court for the Eastern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 20, 1989

ISSUED AS MANDATE:

Supreme Court, U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1500

In The

Supreme Court of the United States

October Term, 1988

LONE STAR STEEL COMPANY

Petitioner,

vs.

GLENN UFFELMAN

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LISTINGS OF ALL THE PARTIES

Undersigned counsel for Respondent, Glenn Uffelman, provides the following list of parties as required by Supreme Court Rule 21.1(b):

1. Lone Star Steel Company, Petitioner.

2. Glenn Uffelman, Respondent.

3. Counsel:

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TABLE OF CONTENTS

Page

LISTINGS OF ALL THE PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. THE OPINION OF THE COURT OF APPEALS IS A WELL CONSIDERED AND RESPONSIBLE APPLICATION OF SETTLED LAW, AND IT SHOULD NOT BE REVIEWED ON CERTIORARI 3

II. THIS COURT HAS ESTABLISHED THAT THE *THURSTON* STANDARD IS THE APPROPRIATE STANDARD IN DETERMINING WILLFULNESS UNDER § 626(B) OF THE ADEA AND HAS ARTICULATED CLEARLY THE CONTOURS OF THAT TEST SO THAT NO DOUBT CAN REMAIN AS TO ITS MEANING 5

CONCLUSION 8

APPENDIX

COURT'S INSTRUCTIONS TO THE JURY: EXCERPT DEFINITION OF WILLFULNESS ...App. 1

TABLE OF AUTHORITIES

Page

CASES

Brock v. Shirk, 860 F.2d 1545 (10th Cir. 1988) 7

Coston v. Plitt Theatres, Inc., 860 F.2d 834, 836 (7th Cir. 1988) 6

Dreyer v. Arco Chem. Co., 801 F.2d 651 (3d Cir., 1986) 4

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 4

Lone Star Steel Co. v. Uffelman, 863 F.2d 404, 410 n.5 (5th Cir. 1989) 4, 7

McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988) 5, 6, 7

PFORR v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988) 7

Rengers v. WCLR Radio Station, 857 F.2d 363 (7th Cir. 1988) 7

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 4, 5, 6, 7

Wilhelm v. Blue Bell, Inc., 773 F.2d 1429 (4th Cir. 1987) 5

STATUTES

ADEA, 29 U.S.C. §621, *et seq.* 1

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Glenn Uffelman, respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the Court of Appeals for the Fifth Circuit's opinion in this case. That opinion is reported at 863 F.2d 404 (5th Cir. 1989).

STATEMENT OF THE CASE

Respondent Glenn Uffelman brought an action pursuant to the Age Discrimination in Employment Act

(ADEA), 29 U.S.C. §621, *et seq.*, against Petitioner Lone Star Steel Company ("Lone Star") for his unlawful discharge. Based on the jury's findings that Lone Star willfully terminated Mr. Uffelman because of his age, the District Court for the Eastern District of Texas entered judgment in favor of Respondent. The district court denied Lone Star's Motion for Judgment Notwithstanding the Verdict.

Uffelman after twenty years experience as a production engineer was hired as a staff engineer for Lone Star Steel Company in 1975 when he was fifty-one years of age. Petitioner's Appendix at A-3 (hereinafter Pet. App.). In 1982, a new manager was hired to head the engineering department. Because of a business decline the new manager decided to reorganize the engineering department by eliminating the construction engineering section in which Plaintiff was assigned (Pet. App. A-4). As part of the planned reorganization Lone Star Steel utilized an evaluation procedure which deviated from the company's standard evaluation policy, (Pet. App. A-11) and failed to develop objective job descriptions called for in the plan (Pet. App. A-4); resulting in the termination of 60% of the engineers over 60 years of age. (Pet. App. A-4). Thus, out of five engineers over age 60, plaintiff and two other engineers over 60 were terminated. Nine of the employees over 40 were terminated while only one of the 24 employees under 40 was terminated. (Pet. App. A-8)

Additionally, in support of his contention that the termination was in willful violation of the ADEA Plaintiff proved that Lone Star Steel was attempting to avoid the expense of paying him his retirement pay. Although he had reached age 60, he lacked 9 months of the ten years

required for vesting under the Lone Star Steel retirement plan when terminated. (Pet. App. A-8)

On appeal, the Court of Appeals for the Fifth Circuit affirmed the lower court's opinion in its entirety. The Court of Appeals held that the evidence was sufficient to support 1) the jury's finding that age was a determinative factor in Lone Star's decision to terminate Uffelman and 2) a finding of willfulness. With respect to the standard for "willfulness" invoked by the District Court, the Court of Appeals specially noted that Respondent had prevailed even though the lower court instructed the jury according to the "outrageous" conduct test – "the most stringent standard [for willfulness] adopted by any circuit."

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE OPINION OF THE COURT OF APPEALS IS A WELL CONSIDERED AND RESPONSIBLE APPLICATION OF SETTLED LAW, AND IT SHOULD NOT BE REVIEWED ON CERTIORARI

Review by Writ of Certiorari in the Supreme Court of the United States is not a matter of right. Rule 17 of the Rules for the Supreme Court sets out the criteria to be used in determining whether review by the Supreme Court is necessary or proper in a given case. The decision below does not involve an area of unsettled law and did not depart from established precedent. This case does not merit further review.

Petitioner in its Petition for Writ of Certiorari expresses dissatisfaction with the Court of Appeal's use

of the *Thurston* standard for resolving the issue of "willfulnesss" under the ADEA. *See* Pet. App. at 1. Petitioner fails to identify any alternative to the "knowing or reckless disregard" standard as the appropriate test in ADEA cases; presumably, Petitioner would have the Court apply the most stringent test available, namely the "outrageousness" standard invoked by the Court of Appeals for the Third Circuit in *Dreyer v. Arco Chem. Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Yet the peculiarities of this case confirm that application of a test that far exceeds the *Thurston* standard, such as the *Dreyer* test, would provide no relief to Petitioner.

For whatever reason, the District Court in this case actually instructed the jury that in addition to finding a knowing or reckless violation of the ADEA, it had to find "that the Defendant engaged in outrageous conduct beyond mere violation of the [ADEA]" in order to find willfulness. *See* (Respondent's Appendix A). The jury so found and awarded Mr. Uffelman liquidated damages. On review, the Court of Appeals for the Fifth Circuit held that the facts before the jury were sufficient to entitle it to find that Lone Star willfully terminated Mr. Uffelman. See *Lone Star Steel Co. v. Uffelman*, 863 F.2d 404, 410 n.5 (5th Cir. 1989). Thus, the appellate court fully considered Petitioner's dissatisfaction and ruled that the trial court's judgment was correct. In accord with this Court's policy, it should not undertake to review concurrent findings of fact by two courts below. See *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949).

II. THIS COURT HAS ESTABLISHED THAT THE THURSTON STANDARD IS THE APPROPRIATE STANDARD IN DETERMINING WILLFULNESS UNDER §626(b) OF THE ADEA AND HAS ARTICULATED CLEARLY THE CONTOURS OF THAT TEST SO THAT NO DOUBT CAN REMAIN AS TO ITS MEANING

Petitioner has attempted to manufacture a conflict between the Third, Fourth, Sixth, Tenth and Eleventh Circuit Courts of Appeals to support its application for certiorari, see *Petition for a Writ of Certiorari* at 5-6, by identifying differences in semantics in the opinions of these courts. For this reason, Petitioner finds the lower federal courts' use of the *Thurston* "knowing or reckless disregard" standard in ADEA actions to be a controversy of national import even though this Court long-since ended controversy on this issue in *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 100 L.Ed. 2d 115 (1988).

Immediately following the Court's pronouncement in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) that a violation of the ADEA is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," 469 U.S. at 128-29, the courts of appeals began applying *Thurston* to discrete fact situations. For a short time, the courts of appeals experimented with different, yet consistent, interpretations of the "knew or showed reckless disregard" standard. For example, in the first relevant appellate decision following *Thurston*, the Court of Appeals for the Fourth Circuit in *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429 (4th Cir. 1987), reversed a district court's jury instruction because it was similar to the "in the picture" standard rejected in *Thurston*. Over time, although they used different wording, the courts of

appeals recently concluded, "every other circuit, except the Third Circuit, that has addressed willfulness in ADEA cases has adopted the 'knew or showed reckless disregard' standard approved by the Supreme Court in *Thurston*." See *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834, (7th Cir. 1988). In 1986, acting alone, the Court of Appeals for the Third Circuit adopted a relatively more stringent standard of "outrageousness" for awarding liquidated damages in ADEA suits. Thus, contrary to the picture of calamity presented by Petitioner, the post-*Thurston* and pre-*McLaughlin* period was marked by overwhelming consistency amongst the courts of appeals as to the interpretation of the "knew or showed reckless disregard" standard – regardless of whether the particular suits involved disparate treatment or disparate impact.

If any questions concerning the meaning of the *Thurston* standard did exist, this Court resolved those questions in its May 1988 *McLaughlin* decision. First, the Court in *McLaughlin* reiterated its support for the willfulness standard enunciated in *Thurston*. Therefore, Petitioner's present doubt that the *Thurston* test is the appropriate liquidated-damages test to be applied by the federal courts in ADEA cases is misplaced. Second, the Court in *McLaughlin* gave further definition to the term "willful." The Court clarified that willful conduct under *Thurston* requires more than mere negligence. It required recklessness. Due to *McLaughlin*, any differences of interpretation of the *Thurston* standard amongst the courts of appeals now are purely semantic. The Court of Appeals for the Third Circuit indeed may continue to use the term "outrageousness"; however, after *McLaughlin*, reckless conduct on the part of employers will prove sufficient to

meet the "outrageousness" standard in liquidated damages assessments in ADEA cases.

Due to clarification by this Court in *McLaughlin*, today no important difference amongst the courts of appeals can remain in interpreting the standard for "willfulness" set forth in *Thurston*. Indeed, those courts of appeals that have passed on the issue of willfulness under the ADEA since the *McLaughlin* decision unanimously have adopted its interpretation of *Thurston*. See, *e.g., PFORR v. Food Lion, Inc.*, 851 F.2d 106 (4th Cir. 1988); *Rengers v. WCLR Radio Station*, 857 F.2d 363 (7th Cir. 1988); *Brock v. Shirk*, 860 F.2d 1545 (10th Cir. 1988). Even in this particular case, the Court of Appeals for the Fifth Circuit reviewed the district court's finding of willfulness in light of the Supreme Court's pronouncement in *McLaughlin*. See *Uffelman*, 863 F.2d at 409. Therefore, it is quite curious that Petitioner herein fails to mention *McLaughlin* – clearly the controlling authority in this field – in its Petition for Writ of Certiorari.

Petitioner further argues that this case presents the question of whether the Supreme Court's decision in *Thurston* is applicable to cases of disparate treatment, or only to cases of disparate impact. This Court's very recent reiteration of support for the *Thurston* test eliminates any doubt that it constitutes the sole, appropriate standard for determining an employer's liability for liquidated damages under §626(b) of the ADEA. Thus, an employer, unlike the Petitioner herein, who adopts criteria which adversely impact whether recklessly or knowingly in order to discriminate against an employee, acts willfully as defined by this Court in *Thurston* and as affirmed recently in *McLaughlin, supra*.

CONCLUSION

For these reasons, the Respondent prays that the Petition for Writ of Certiorari be DENIED and that Respondent be awarded double costs and fees based upon Petitioner's bad faith filing.

Respectfully submitted,

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RESPONDENT'S APPENDIX – A

To establish a willful violation, the Plaintiff must prove by a preponderance of the evidence the following two elements: first, that the Defendant knew that its termination of the Plaintiff violated the law, or that the Defendant showed reckless disregard for whether its conduct was violative of the law; and, two, that the Defendant engaged in outrageous conduct beyond mere violation of the Age Discrimination In Employment Act.

In making your determination of whether there was a willful violation, you may consider any evidence that the Defendant has offered to show that it acted in good faith and upon reasonable grounds for believing that its actions were not in violation of the law. If the employer can show such good faith, then the employer's violation of the law was not willful.

Excerpt Court's Instructions to the Jury (V.4. p. 289)